Supreme Court, U.S.
FILED
SEP 3 1992
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92-408

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PAULINE MENARD,
Petitioner,

versus

CITY OF BREAUX BRIDGE, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Did the firing of Pauline Menard, for reporting child pornography by fellow police officers to the district attorney's office, while on probation for an unrelated matter and without first notifying her superiors, violate her first amendment constitutional right to free speech as further protected under 42 USC 1983?

2. Did the District Court err in finding that the Defendant's unwarranted actions in dismissing Pauline Menard were not in bad faith?

NAMES OF ALL PARTIES

1. **Pauline Menard**, Plaintiff
2. **City of Breaux Bridge**, Defendant
3. **Louis Kern, Mayor of Breaux Bridge**, Defendant
4. **George Menard, Police Chief of the City of Breaux Bridge**, Defendant
5. **Wilbert Alexander, Alderman, City of Breaux Bridge**, Defendant
6. **Anthony Hebert, Alderman, City of Breaux Bridge**, Defendant
7. **Vernon Blanchard, Alderman, City of Breaux Bridge**, Defendant
8. **Neil Melancon, Alderman, City of Breaux Bridge**, Defendant
9. **James Hebert, Alderman, City of Breaux Bridge**, Defendant

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OPINIONS BELOW

There are no reported opinions in this case. The opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Attachment A. The opinion of the United States District Court for the Western District of Louisiana is attached hereto as Attachment B.

I.

GROUNDS FOR JURISDICTION

On June 3, 1992, the United States Court of Appeals for the Fifth Circuit affirmed the United States District Court (Western District of Louisiana) decision.

The Supreme Court of the United States has jurisdiction to review the Judgment in question under 28 USC 1254.

II

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. **First Amendment to the Constitution of the United States.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. **42 USC SECTION 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In February of 1989, Pauline Menard was employed with the Breaux Bridge Police Department as a dispatcher. She had maintained this employment for a continuous period of eight years. During this time her performance was satisfactory with the exception of one two-week suspension for a matter unrelated to her reporting of child pornography.

One evening in February 1989, Mrs. Menard was working her usual shift, when fellow officer Howard Devillier showed her photographs he had found in the desk of police detective Roger Istre. The photographs were of two black female juveniles posing with their breasts exposed. At the time, Mrs. Menard was shocked and did not know who to notify. She did not know whom she could trust in the department, and felt that she could not go to Police Chief George Menard (no relation to Petitioner) because she

believed he always showed favoritism towards Istre and could possibly be involved. She could not go to Assistant Chief Charlie Thibodeaux because his office was in the same room as detective Istre, and she feared he may also have been involved. She feared that this pornography and possible child molesting was ongoing, and did not know the extent. She felt she must do something. She talked the situation over with her husband, Eldridge Menard, and then decided to report it to proper authorities after first meeting with a good and trusted friend, civic leader Palmer Johnson. He suggested they notify the FBI. The Menards then met with Steve Champagne, an employee of the District Attorney office, and an investigation was begun which resulted in the arrest of Roger Istre.

Several other officers knew of the photographs and none reported the matter

to Chief Menard. These three other officers were suspended, but Mrs. Menard was the only one who was fired, specifically on Chief Menard's recommendation that she be terminated. Based on this recommendation, the City Council terminated her employment. Chief Menard cited as reasons for the recommendation the fact that she was on probation at the time for an unrelated matter, that she had not informed her superiors, and that she had released information to "outsiders" not on the police force.

Defendants contend that she did not follow the proper chain of command and reported the matter to "outsiders." This decision to terminate her was made because Mrs. Menard exercised her 1st amendment right to freedom of speech, and so she filed suit under 42 U.S.C. 1983 against the City of Breaux Bridge, et al for

violation of her civil rights. The federal District Court heard the case on August 20, 1991, and rendered judgment in favor of Defendants, finding that Mrs. Menard, who acted in good faith, should not have been discharged for failure to follow the chain of command, but that the termination of her employment did not merit the protection of Section 1983, and no constitutional right to speech was violated by the defendants' actions. Petitioner Menard brought an appeal to the 5th Circuit Court of Appeals, which affirmed the District Court, and now asks this Honorable Court for review of the improper judgment.

ARGUMENT RE: ISSUE I.

1. **Did the firing of Pauline Menard, for reporting child pornography by fellow police officers to the district attorney's office, while on probation for an unrelated matter and without first notifying her superiors, violate her first amendment constitutional right to free speech as further protected under 42 USC 1983?**

Pauline Menard was terminated from her job as a police dispatcher for telling her husband and the District Attorney's office of two photographs taken by a fellow police officer of female juveniles exposing their breasts. Upon this notice, an investigation was performed by the District Attorney and Sheriff's offices, which resulted in the arrest of Breaux Bridge police officer Roger Istre. It is undisputed that the only notification to these offices came through Pauline Menard, even though Defendants claim other officers were investigating. Pauline Menard was subsequently fired on recommendation of Police Chief Menard.

Reasons given were her telling of these photographs to "outsiders," in violation of an unrecorded chain of command, and being on probation for an unrelated matter.

Defendants contend that she was discharged partially because she was on probation for an unrelated matter. Pauline Menard had apparently been placed on probation for not passing on information to an officer on call. Defendants attempt to hide their violation of her constitutional right to reveal corruption by arguing that the fact of probation is relevant. As to whether her free speech was violated, this fact is irrelevant. One cannot be terminated for exercising constitutionally protected speech. Had she not spoken to the District Attorney, she would not have been fired. Defendants' actions are in clear violation of constitutional law.

The District Court found that Pauline Menard should not have been terminated. The District Court also found that Pauline Menard reported the incident to a law enforcement officer, that being the district attorney, and that Pauline Menard acted in good faith. These finding of fact were not erroneous and should not be disturbed.

What was erroneous was that, despite its findings above, the court still concluded that Pauline Menard's speech did not "merit(s) the protection of Section 1983, which requires that a constitutional right be involved." Pauline Menard's termination resulted directly because of her exercise of free speech in revealing the internal corruption. Clearly, a constitutional right is involved.

The controlling law for determining whether a person was improperly and unconstitutionally discharged for

exercising free speech is clearly established in the constitutional law. A public employee can not be discharged for exercising his or her protected right to free speech under the first amendment of the U. S. Constitution. Pickering v. Board of Ed. of Tp. H.S. Dist. 205, ILL., 88 S.CT. 1731 (1968); Rankin v. McPherson, 483 U.S. 378, at 383 (1987); Connick v. Meyers, supra, at 1687 (1983). Thompson v. City of Starkville, Miss., 901 F.2d 456, 460 (5th Cir. 1990); Price v. Brittain, 874 F.2d 252, 256 (5th Cir. 1989); Page v. Delaune, 837 F.2d 233, 237 (5th Cir. 1988). This right is limited, and a balancing of interests is necessary to determine if the right was violated. The proper balancing test was established in Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill., supra. That the test be carefully applied is essential, and it is not to be pushed aside so as to allow a

court to decide haphazardly. This Supreme Court has said that this balancing "is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment." Rankin v. McPherson, 107 S.Ct. 2891 (1987) at 2897.

The correct analysis consists of several steps: the speech must involve a public concern, the employee's interest must be balanced against and outweigh that of the defendants, and the protected speech must have been a substantial factor in her discharge. The 5th Circuit explained this analysis in Thompson v. City of Starkville, Miss., supra, at 460:

> Case law, in this circuit, considering the question of whether particular speech by a public employee is protected has applied the following analysis: In order to establish a constitutional violation [the plaintiff] must first prove that her speech involved a matter of public concern. Connick v.

> Meyers, 103 S.Ct. at 1684, ...(1983). Second, she must demonstrate that her interest in "commenting upon matters of public concern" is greater than the defendants' interest in "promoting the efficiency of the public services [they] perform". Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill., 391 U.S. 563,...(1968). Third, she must show that her speech motivated the defendants' decision to fire her. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274,...(1977).

In the present matter, the District Court did not apply this test in any more than a cursory manner. Properly applied, the only reasonable conclusion to be reached is that the firing of Mrs. Menard for reporting the photographs to her husband and the District Attorney and not to her superiors was clearly in violation of her constitutional right to exercise free speech. The following analysis of the facts as determined at trial to the proper law will verify this conclusion.

Matter of Public Concern

The exercise of free speech by Mrs. Menard consisted in her telling her husband Eldridge Menard, civic leader Palmer Johnson, and the District Attorney of the discovery of photographs of nude children that were in the desk of a fellow police officer. To be protected, Mrs. Menard's speech must be "fairly characterized as constituting speech on a matter of public concern." Connick v. Meyers, supra, at 1689. "Whether an employee's speech addresses a matter of public concern must be determined in the content, form, and context of a given statement, as revealed by the whole record." Connick, supra, at 1690. Although Defendants contested whether the speech was of public concern in their Court of Appeals Appellee Brief, they conceded that it was a matter of public concern during oral arguments before the 5th Circuit Court of Appeals.

The content of Mrs. Menard's speech was evidence of child pornography and possible child molesting. This is a valid public concern. Mrs. Menard's concern was that child molesting was occurring and had to be stopped. She testified that "I have kids. Everybody in here have [sic] kids, and he maybe would have kept on doing the same thing and got more kids involved." (trans. vol.3 p. 83). The public has a true concern for the safety of its children, especially from sexual exploitation. This content did not involve matters solely concerning internal employment policy, but rather involved a matter of true public concern. Mrs. Menard spoke as a citizen concerned about the welfare of the children in the community, and not as an employee dissatisfied with management.

The matter involved a police officer taking photographs of nude children,

evidencing clear impropriety in the police department. As such, the constitutional jurisprudence grants this speech constitutional protection. This case is similar to Thompson v. City of Starkville, Miss., supra, which concerned a discharge of a police officer allegedly for written grievances and oral complaints he made concerning egregious misconduct by certain fellow police officers. In upholding a denial of the defendants motion for summary judgment, the 5th Circuit Court of Appeals held that a higher protection is to be granted when the speech involves police misconduct, at 463:

> this court has held, albeit under different facts, that where speech "complained of misconduct within the police department, it should be classified as speech addressing a matter of public concern." If released to the public, Thompson's affidavit would expose possible corruption in the police force of the City. (quoting Brawner v. City of Richardson, Tex., 855 F.2d 187 at 192. (5th Cir. 1988).

Brawner involved a police officer who had his attorney send a letter to the city leaders and local papers requesting an investigation concerning incidents of the police department keeping noncriminal files on citizens and reporters, as well as allegations of drug use by officers which were covered up by the department. In upholding the district courts denial of the defendants' summary judgment motion, the 5th Circuit in Brawner stated, at 192:

> The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of the police department.

The court in Thompson v. City of Starkville, Miss., supra, at 463, also quoted the 10th Circuit case of Conaway v. Smith, 853 F.2d 789 (1988), stating "speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of city officials,

in terms of content, clearly concerns matters of public import." Certainly the court should have found the speech concerning child pornography and potential child molestation to be of public concern, even without the higher protection the 5th Circuit gives to speech concerning police misconduct.

This court addressed the applicable law in Connick v. Meyers, supra, where District Attorney Harry Connick fired an assistant district attorney for what he termed insubordination. The contested speech was a questionnaire circulated by Sheila Meyers to her fellow employees. Meyers had been upset because of an unwanted transfer and a prior heated exchange with Connick concerning the transfer order. The Court considered the form and context of the speech as well as the content in determining whether the speech involved a public concern. They

found the questionnaire did not serve any other purpose than to "gather ammunition for another round of controversy with her superiors." Connick, supra, at 1691. The questionnaire was written immediately by Meyers following her argument with her supervisors. Meyers testified that the timing was not accidental.

In contrast, Mrs. Menard's speech was in the form of discrete disclosure in an effort to seek help in stopping a public threat. The context involved a time when she feared reporting to her superiors would not end the public threat as she did not know which officers may have been involved. (trans. vol.3 p. 82, 83). All of the factors Connick required for speech to be public are met in the issue now before this Honorable Court. In deciding that all but one of the questions were not of public concern, this court in Connick went on to state that Meyers did not "seek

to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." Mrs. Menard did bring to light to the proper authorities wrongdoing in the police department; child pornography and possible child molesting. She caused an investigation which resulted within three days in the arrest of the offender. This stopped potential and actual wrongdoing which clearly endangered the well-being of the town children.

Balance of Interests

Once we establish that the speech is of public concern, we perform a balancing of both parties interests. Determining whether or not an employee's right to free speech has been violated requires a balancing of the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in

promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill., supra. Although the court properly found this standard, it did not actually balance the conflicting interests of both parties. A balancing of the evidence of the interests of Mrs. Menard and the police department presented at trial clearly weighs in favor of Mrs. Menard.

In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. Rankin v. McPherson, supra, at 2899. Therefore the District Court should have considered the situation surrounding Mrs. Menard's disclosure to her husband, civic leader Mr. Johnson, and the district attorney's office instead of to her

superiors. Mrs. Menard reasonably believed that nothing would be done towards a potential child molester, and that anyone in the department could have been involved because the photos were found in the office shared by the Assistant Chief of Police and the offender Istre. (trans. vol.3 p.82). Mrs. Menard believed that Chief Menard would not do anything, "because several incidents happened in the police department where he didn't do anything about it." (trans. vol.3 p.83). She believed that Istre would not be exposed by the Chief because Istre had been rehired at the recommendation of the Chief of Police despite his prior dismissal for rumored impropriety in kicking a black woman in her buttocks. (trans. vol.3 p.25) (Chief Menard said he could not recall the reason for the first dismissal of Istre.) The situation was unstable and Mrs. Menard did

not know whom she could trust to stop the danger to the children in the community, so she sought out the advice of those she trusted most and decided to go to the proper authorities.

In considering the context of what occurred, the court must take note that the incident was reported to the proper law enforcement department by Mrs. Menard and her husband, and led directly to the arrest of Istre within three days. The District Court did find that Mrs. Menard informed the D.A. In all likelihood, notifying the Police Chief would have permitted a much longer period of time to stop this child pornography and possible child molesting, and the dangerous situation would not have been alleviated as soon. The District Attorney's office immediately notified the Sheriff's office, which conducted the actual investigation. As acknowledged by Chief Menard, the

police department had no internal affairs division. Also critical to Mrs. Menard's choice of action was the fact that there is no written policy or procedure for reporting evidence of police or departmental misconduct in the Breaux Bridge Police Department handbook. (trans. vol.3 p.20; trans. vol.3 pg.68; trans. vol.3 pg.92). Nor is the defense claim of "common sense" realistic, much less binding, as defendants would have Mrs. Menard notify no one, including the District Attorney, of this issue so crucial to public welfare.

The very fact that the content was of such serious public concern weighs heavily towards Mrs. Menard's interest in the balancing test. The 5th Circuit in Price v. Brittain, 874 F.2d 252 (5th Cir. 1989), at 258, reiterated this by stating that "in assessing the weight to be accorded to the plaintiff's free speech interests we

also consider the extent to which that speech implicates matters of public concern."

In weighing the interests of the police department in promoting its efficiency, the 5th Circuit has said that three aspects of the speech must be considered: 1) whether the speech was likely to generate controversy and disruption, 2) whether the speech impeded the department's general performance and operation, and 3) whether the speech affected working relationships necessary to the departments proper functioning. Brawner v. City of Richardson, Tex., supra. The defendants did not introduce any evidence of disruption of the general performance and operation of the police department. They did not show any evidence of damage to the Sheriff's investigation of Istre, and in fact Istre was arrested within three days of Mrs.

Menard's disclosure. The only contention made by defendants was a statement by police Chief Menard that "everyone on the street knew" of the incident. (trans. vol.3 p.27). The evidence indicates this to be untrue, as every witness following the Chief testified that they heard no rumors or talk from anyone on the street concerning the incident. (trans. vol.3 p.57, and vol.4 p.42, 46). Chief Menard did not in any way indicate that knowledge by outsiders damaged the Sheriff's investigation, but rather simply expressed disappointment that he was not informed. (trans. vol.3 p.26).

The defendants also contend that, although it did not in this case, outside knowledge may have injured an investigation and prosecution. This similar argument was made by the defendants in Brawner v. City of Richardson, Tex., supra. Those defendants

contended that they maintained an interest in an internal investigation. Their argument was supported by the fact that the Richardson police department maintained an internal investigation department, unlike the Breaux Bridge Police Department in the present matter. Any investigation in the Breaux Bridge Police Department would have been conducted by an outside office, the Sheriff, with or without Mrs. Menard's disclosure. The court in Brawner defeated this argument because the content of the speech was police misconduct, which is virtually always considered public content. The court stated that "even assuming that the department maintained an interest in a confidential internal investigation, such an interest would be outweighed by the public's interest in the disclosure of misconduct or malfeasance." Brawner, supra, at 192. The same

reasoning should apply to the present situation. The public's interest in stopping any child molesting and pornography occurring in the police department outweighs any interest Breaux Bridge maintains in a confidential internal investigation. Further the only effect of the disclosure was an extremely positive one, the arrest of Istre. The statement could not have affected the proper functioning of the department, because the statement involved was made for the very reason that the police department was not operating properly; corruption in the department existed and there was no way to know who was involved.

The defendants contend that the police department has a strong interest in maintaining loyalty and cite Connick v. Meyers, supra, for the proposition that the government must have wide discretion and control over the management of its

personnel and internal affairs. However, in discussing this, Connick, also stated that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." Connick, supra, at 1693. The speech in Connick was a questionnaire with only one sentence indicating any public concern; possible pressure on the employees to assist in political campaigns. In contrast all of Mrs. Menard's speech involved public concern over serious danger to children. Clearly the stronger showing mentioned in Connick is necessary to defeat the speech interest of Mrs. Menard. The speech by the Connick plaintiff was found to be disruptive and tended to create serious problems in the relationship between the district attorney and his assistant district attorneys. If the Connick plaintiff had not been fired, the rift she created would remain and the

efficiency of the department would definitely have been affected. This is not the case in the Breaux Bridge department. The actions of Mrs. Menard were in no way disruptive to the department. The speech was communicated to someone outside the department so the relationships between the employer and employees was not affected. As to her relationship with all other fellow officers, Petitioner would show this court that there were 14 or 15 officers employed by the Breaux Bridge Police Department at that time. (trans. vol.3 pg.10). City Attorney Mike Harris' report, discussed below, lists at least five different officers involved in sexual improprieties with juveniles. This is at least one third of the relationships Pauline Menard "affected" by her disclosure. Clearly, these are not working relationships with which she should have been concerned. Had

Mrs. Menard been able to maintain her job, no disruption would have resulted from her speech.

Petitioner agrees that the police department had an interest in developing efficiency, loyalty, and trust. However, in no way will Petitioner concede that loyalty, efficiency, and trust should be granted to protect fellow officers from criminal charges for child molestation and to allow continuance of such heinous deeds. The Breaux Bridge Police Department does have an interest in instilling public confidence in the institution, but Plaintiff is under no obligation or justification to help seduce the public into a false confidence by hiding evidence of child molestation and child pornography committed by officers sworn to protect the public.

Petitioner agrees that the state has an interest, as stated by Defendants, in

"a high degree of trust and loyalty among the officers and their supervisors" and that "confidentiality is a necessary ingredient for a stable, efficient police department." This, however, does not apply to a cover-up. Pauline Menard's interests in protecting her children by exposing any corruption and child molestation that she is aware of clearly outrides any duty to be "loyal" and maintain "confidentiality" which would only serve to cover up the police action, and alert any potential wrongdoer so that he may destroy evidence.

The environment in the police department as to which defendants would have preferred that Pauline Menard keep her mouth shut was one of corrupt and rampant policy impropriety and must be considered. Attorney Mike Harris' report, entered at trial as Plaintiff's Exhibit P-10 and further entered into this appeal as

Defendants' Supplemental Record Excerpt D-3, paints the picture clearly of the environment in which Pauline Menard worked. Besides pornographic photos of children in police officers' desks, the report states that there were rampant episodes and reports of child molestation, sexual impropriety, child sexual abuse, statutory rape, and homosexual relationships with juveniles. All of these claims involved officers of the police force to whom Pauline Menard is supposed to support, trust, and establish close working relationships with:

> "From another source in the S.O., I learned that Goodie and Derouselle were directly in one incident where one juvenile was held down and partially stripped while a picture was taken.
>
> I have also been advised that Ezebe [Chevallier] and Howard [Devillier] are sexually involved with a minor. There is no confirmation as the S.O. states that the girl denies the claim. Apparently there are no independent witnesses. We were also advised that several

> juveniles claim to have been picked up, and [ridden] around with police officers until two or three in the morning..
>
> ***
>
> The Mayor, Chief Charlie and I met with the Sheriff and Butch Dupuy. The above facts were confirmed. . .
>
> ***
>
> Regarding the various juveniles, only one of the incidences is really troublesome, that of the child held down and photographed. The rest appear to be willing participants. There is a claim of a homosexual relationship which may also be a problem; however, the D.A. may not even accept charges here. In any event, the potential exposure to the City may exceed the ability to pay. Appropriate steps may have to be taken to seek protection.
>
> I have also learned that, at least on one occasion, Roger, acting alone, forced two females to disrobe, while they were detained for an offense which would not require a search."

All of these findings were known and written into this report <u>before</u> Pauline Menard was fired by the City Council. Portions of this report were read to the

City Council during the hearing which involved the determination of whether or not Pauline Menard would be fired. (trans. vol.4 pg.74; trans. vol.4 pg.76-77; trans. vol.4 pg.79-80).

The facts of this case are very similar to Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984), where it was argued that the police department maintained a strong interest in the "chain of command" being followed. There a dispatcher was fired for reporting misconduct on the police department to a person outside the departments' "chain of command." Brockell phoned another police department, which would be administering a test to the members of Brockell's police department, and reported a fellow officer's possession of an answer sheet to that test. The Court of Appeals held that his dismissal was not for a valid reason, noting that the outside party was in good position to

make a quick investigation and resolution and plaintiff's speech was a less disruptive method of communication that may have been chosen. Similarly, Mrs. Menard reported the incident to an outside party in position for a quick investigation and resolution - the district attorney. She could certainly have reported the incident to the media, or in some other more disruptive method of communication. The court in Brockell found that the "chain of command" was not written in any manual or handbook generally available to employees. Similar, the handbook of Breaux Bridge does not have any written chain of command or procedure for reporting internal misconduct. (trans. vol.3 p.20). The court in Brockell also found that the plaintiff maintained a legitimate doubt whether reporting the misconduct would resolve the matter because of certain

favoritism shown by the Mayor and/or Chief towards the person committing the malfeasance. Similarly the evidence shown at trial shows that Mrs. Menard had a legitimate belief that following the "chain of command" would not resolve the problem because of the favoritism shown by Chief Menard. In discussing chain of command, the Brockell court stated:

> We cannot simply decide in the abstract, however, that a chain-of-command policy designed to protect this interest will always take precedence over the interest of a public employee in open communication. Rather, we must look to the particular circumstances of each case to determine the importance of enforcing the chain of command against an employee whose speech breaches that policy. Brockell, supra, at 667.

The court also stated:

> An employee's first amendment interest is entitled to more weight where he is acting as a whistleblower exposing government corruption. Brockell, supra, at 668.

Upon balancing, it is clear that Mrs. Menard's interest in her protected speech concerning police misconduct involves a public concern and substantially outweighs any interest the police department has in its efficiency. Her speech is entitled to even greater protection because of its police misconduct content, and there was no disruption caused in the police department. Its normal operation was in no way affected, and no relationship between employer and employee was damaged except that of Istre.

This court must consider all the factors surrounding Petitioner's exercise of free speech, and it would be absurd to allow the Defendants' conclusion that the fact that Pauline Menard revealed information of such corrupt and unthinkable acts and breach of public trust in he policy department means she can't be trusted in future Breaux Bridge

routine police investigations. Defendants state that "it is clear that her conduct nevertheless insidiously weakened the functions of the Breaux Bridge Police Department and potentially impedes its future operations." (trans. vol.3 pg.29). However, it appears obvious to Petitioner that the "weakening of the functions of the Breaux Bridge Police Department" are clearly a result of the individual officer's criminal conduct and sexual impropriety with children, and has nothing to do with Pauline Menard's disclosure of these to the District Attorney.

Mrs. Menard simply made a decision concerning how to stop a public threat to children in the community, and acted in the manner she reasonably thought was best to alleviate the danger. We should also look at the ultimate result of her actions: Istre was arrested within three days, the danger to children in the

community was abated, no damage occurred to the investigation, and no hindrance of the police departments normal routines occurred. Nevertheless, Mrs. Menard was terminated for making the proper decision.

Speech as a Substantial Factor in the Termination

The last question to be decided is whether Mrs. Menard's exercise of protected speech was a substantial factor in her termination. The key question is whether the termination was justified. The District Court herein found that the termination was not justified:

> "I don't believe that her dismissal from the force is commensurate with the offense which she allegedly committed, that is to say, as stated, that failure to report it to her immediate superior or the Chief. She did report it to a law enforcement officer. That was the District Attorney...
>
> * * *
>
> ...I don't think Mrs. Menard should have been terminated for that reason. I think she deserved, if anything, the same punishment as [meted] out to the

> other officers who failed to make the disclosure to the Chief....
>
> * * *
>
> ...I don't believe that the case is one that merits the protection of Section 1983, which requires that a constitutional right be involved." (trans. vol.4 p.135-136)

The speech of Mrs. Menard was the sole reason for her discharge. She would not have been terminated otherwise. Section 1983 does afford Mrs. Menard protection from termination for her conduct and actions. The trial court found in favor of Petitioner on the facts and summarily declared that said fact situation did not rise to the level of a Section 1983 protection. The jurisdiction cited by Petitioner above clearly refutes the trial court's interpretation of the law and the facts of this case.

The Chief's recommendation for the termination stated the reasons as follows:

> This action results from your failure to advise your superiors, specifically myself

> and Assistant Chief Thibodeaux of evidence you were aware of pertaining to the possible misconduct of a fellow officer. Further, you have failed to notify the proper legal authorities, in violation of your swor[n] duty to so act. In addition, you provided this information to a civilian outside the police department. These actions are contrary to department policy, and adversely reflects upon your ability to perform your duties as a police officer. (Defendants exhibit D-1, letter of suspension to P. Menard from Chief Menard.)

Her prior probation is irrelevant; they would not have fired her if she had not gone to the District Attorney with her husband. Chief Menard and the city council said that her actions in speaking to someone outside the chain of command was reason enough for her termination. Yet fellow officer Howard Devillier also broke the chain of command; although he notified Sergeant Ezebe Chevallier, he also reported the photographs to a non-law enforcement person, councilman Wilbert Alexander. (trans. vol 3, p.54 and 66).

Neither Devillier nor Chevallier notified the Chief, but "just decided ourselves to conduct an investigation." (trans. vol. 3, p.54). Yet they were not terminated. The same reasoning and dangers argued by defendants towards disclosing information to an outsider and non-law enforcement officer apply here. Surely this is the same offense committed by Mrs. Menard, yet she was terminated while Devillier and Chevallier were not.

City Councilman Alexander testified that he made his decision to terminate Mrs. Menard solely on the letter of recommendation by Chief Menard, and that the council did not investigate the matter. (trans. vol. 4 p.56). Councilman Vernon Blanchard testified that her actions in going to a "civilian" outside the police department was improper and that "there's a lot of scrutiny that should be held in the police department

and that should be kept in the police department. It should not be shared with anybody who is a civilian and not a police officer." (trans. vol.4 p. 67). As to a policy for reporting police misconduct, he stated that "I don't think we have the policy, but common sense tells you you don't go on the street and tell civilians. I think common sense tells you that." He voted to terminate her after assurance from the city attorney Mike Harris that termination was appropriate. (trans. vol.4 p.70- 71). Blanchard stated that he was unaware that she had notified the district attorney indirectly. (trans. vol.4 pg.66).

The evidence presented here clearly shows that Pauline Menard's decision to exercise her right to protected speech in reporting the crime to the District Attorney was clearly a substantial factor in her termination, if not the only one.

The defendants have not shown that the firing of Mrs. Menard was justified, and she has shown that her speech was a substantial factor in her termination. Mrs. Menard has shown that her speech did involve a public concern, and that this concern involved police misconduct and as such is entitled to even higher protection. Plaintiff has shown that her interest as a citizen in disclosing the information of great public concern to the District Attorney outweighs any interest the Breaux Bridge Police Department may maintain in efficiency. Mrs. Menard has shown that her speech was a substantial factor in her unjustified termination. Clearly Mrs. Menard had a constitutionally protected right to speech, and that right was infringed upon by her improper termination in clear violation of 42 U.S.C. sec. 1983. The District Court erred in finding otherwise.

ARGUMENT RE: ISSUE II.

2. **Did the District Court err in finding that the Defendant's unwarranted actions in dismissing Pauline Menard were not in bad faith?**

The court found that the defendants acted in good faith in everything they did. It found that the plaintiff had not carried her burden of proving that the defendants "collectively or individually or willfully acted in their official capacity to deprive her of her constitutional rights..." (trans. vol.4 p.137). If the court had properly found that a violation of Mrs. Menard's right to free speech had been violated, then this finding of good faith on the part of the defendants would be a finding of a successful qualified immunity defense. This would be improper as well, because the court would not have reached this conclusion had they applied the proper law.

To determine if a defendant has qualified immunity, the U.S. Supreme Court and the 5th Circuit requires that the court "evaluate whether the constitutional right asserted was 'clearly established' at the time of [the public official's] conduct so that a reasonable official would have understood that his conduct violated that right." Thompson v. City of Starkville, Miss., supra, at 468, quoting Brawner v. City of Richardson, Tex., supra, at 191. Therefore defendants are not shielded from civil liability if "their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known". Thompson, supra, at 469 quoting Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982). In Thompson, the 5th Circuit discussed whether qualified immunity applied to police officers who had allegedly fired plaintiff as a result of

his complaints of unearned promotions and other grievances. The court restated the inquiry as whether the individual defendants would reasonably have known that their actions would violate [plaintiff's] right to free speech. The court found that at the time of Thompson's speech, it was well settled that public employees could not be fired for exercising their first amendment rights. Thompson's speech occurred in 1981 when he filed grievances. Mrs. Menard's speech occurred in February of 1989. Clearly, the constitutional law protecting free speech known and established in 1981 was also known and established in 1989. The 5th Circuit also faced the issue of qualified immunity in Brawner v. City of Richardson, Tex., supra. The court stated the same standard of reasonableness in violating an established right to free speech and held:

> At the time that [the attorney] wrote on Brawner's behalf and Brawner was discharged, the First Amendment right of an employee to speak out on a matter of public concern was clearly established. It was clearly established that a public employee's speech revealing improper conduct by fellow employees was protected. Thus a reasonably objective public official would have known that termination of an employee for his speech concerning misconduct by public officials would violate a clearly established constitutional right. (Brawner v. City of Richardson, Tex., supra, at 193.)

The letter involved in the case above was written in February, 1985. Mrs. Menard's speech occurred in February, 1989. Once again, a constitutional right clearly known and established in 1985 is also known and established in 1989.

For these reasons, all present defendants should be liable for damages incurred by Mrs. Menard for her unconstitutional termination, and attorneys fees and punitive damages should be granted.

CONCLUSION

The case was decided improperly by the lower court. A proper analysis and conclusion would result in a finding that Pauline Menard's constitutional right to freedom of speech was violated by defendants and as such she is entitled to recovery of her damages and attorney fees under title 42 U.S.C. 1983. Petitioner-Appellant prays that the Court of Appeal review the statements and record and overturn the decision, granting judgment in favor of Petitioner-Appellant, Pauline Menard.

Respectfully submitted,

ANTHONY J. BRUSCATO
BAR ROLL NO. 3611

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PAULINE MENARD

CERTIFICATE

I hereby certify that a copy of this Brief was mailed, with attachments, with postage prepaid, to Mr. Chester Cedars, 113 East Bridge Street, Breaux Bridge, Louisiana 70517, counsel for Defendant-Appellee, this 1 day of September, 1992.

ANTHONY J. BRUSCATO
ATTORNEY FOR PETITIONER

APPENDIX

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Opinion of the US District Court for the Western District of Louisiana..... A2

Findings of Fact and Conclusions of Law..... A12

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91-4844

PAULINE MENARD,

Plaintiff-Appellant

v.

CITY OF BREAUX BRIDGE, ET AL,

Defendant-Appellees

Appeal from the United States District Court for the Western District of Louisiana
(CA-89-2739)

Before HILL, KING & DAVIS, Circuit Judges

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

Costs on appeal are to be taxed against plaintiff-appellant.

ISSUED AS MANDATE: June 25, 1992

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

PAULINE MENARD	***CA NO. 89-2739**
VERSUS	***JUDGE PUTNAM**
CITY OF BREAUX BRIDGE, ET AL	***MAGISTRATE TYNES**

JUDGMENT

In accordance with the findings of fact and conclusions of law issued concurrently herewith and the oral reasons set forth by the court at the conclusion of the trial of this matter on August 20, 1991:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants and against the plaintiff, **PAULINE MENARD**, dismissing all of her claims against all of the defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of these

proceedings be paid by the plaintiff, **PAULINE MENARD.**

THUS DONE AND SIGNED in chambers in Lafayette, Louisiana, on this 12th day of September, 1991.

UNITED STATES SENIOR
DISTRICT JUDGE

ORAL REASONS FOR JUDGMENT

***

Gentlemen, there's not much room for the Court to speculate in this case. I believe that the facts show that Mrs. Menard was discharged because she did not go to the Chief of Police or to one of his authorized officers and report the fact that she had found these photographs or someone else had found them and showed them to her, which was suggestive that there was some criminal activity going on in the Police Department. I don't believe that her dismissal should be condoned or is supported by the fact that she did not go to her superior, one of the other police officers in the Breaux Bridge Police Department, and tell them about what she had found or what had been showed to her in Officer Roger Istre's desk. I don't believe that she did this in bad faith, that she did anything that she didn't think was proper. I think she had

a genuine feeling that if she did report it to the Chief of Police, probably nothing would come of it; and so she and her husband went and consulted with her friend, Mr. Johnson. All of this is pretty clear from the evidence. Johnson told them he couldn't do anything about it. He suggested they call the FBI, and I think when the FBI was finally contacted, the FBI said "Go see the Sheriff." so they called and went to see the Sheriff. they did not go see the Sheriff. they went to see the District Attorney, and they were on their way there when they met his investigator. As I recall the testimony, they then explained this to the investigator; and the investigator then went back to his office. And he, the District Attorney or his investigator, instigated an investigation of the incident by the Sheriff's Department, and

that incident ruled in the arrest of Roger Istre and his dismissal from the force.

Now, we have a situation where all of the defendants in this case, with the exception of the Chief of Police, were instrumental or were the only ones, the only ones in authority who had the power to discharge a police officer. So the Chief went to the Council, wrote them a letter, and recommended that this woman be discharged and that the other officers who also knew of the incident and didn't report it to him be suspended for a certain period of time. I don't believe that Mrs. Menard should have been discharged for this reason. I think she deserved, if anything, the same punishment as meaded out to the other officers who failed to make the disclosure to the Chief. It think there were six other officers, were there not, gentlemen, six

others who were suspended? How many officers were suspended?

MR. CEDARS: Three, Your Honor.

THE COURT: Three. Those three officers were suspended. I don't believe that her dismissal from the force is commensurate with the offense which she allegedly committed, that is to say, as stated, failure to report it to her immediate superior or the Chief. She did report it to a law enforcement officer. That was the District Attorney. The District Attorney did instigate an investigation. It was investigated. Whether or not she was justified not telling the Chief is one thing.

There's no evidence in this case that justifies the conclusion that there might have been some collusion between the Chief and the offending officer, Roger Istre. There was really no evidence to show any connection that it was the Chief and the

activities of Mr. Istre in connection with a juvenile. Nevertheless, gentlemen, I don't believe that the case is one that merits the protection of Section 1983, which requires that a constitutional right be involved. I believe that Mrs. Menard acted in good faith in everything she did, and I believe that the Chief of Police and the defendants also acted in good faith in everything that they did. I don't think that the plaintiff has carried the burden of proving her case in this case by a preponderance of the evidence, that the defendants collectively or individually or willfully acted in their official capacity to deprive her of her rights guaranteed by the Constitution of the United States as provided in Section 1983 of the United Stated Code. So I am going to render judgment in favor of the defendants and against the plaintiff.

I would also say, gentlemen, that I recommend to you that you consider reinstating this lady on the police force. I think she probably is a good officer and has made a good officer in the past. It's true she was under some sort of suspension at the time this incident occurred. She was on probation for that; but whether or not the other three officers who were with her were suspended and whether or not they have been reemployed, I don't know. It wasn't brought out in evidence. I don't know whether they have been reemployed or not. I think that she certainly ought to be reemployed; although I'm not going to order that she be reemployed because I've granted judgment in favor of the defendants. I think her position at least warrants that she be reinstated and she be cleared of any notion that she was darelict in her duty as a police officer

while working for the City of Breaux Bridge or Town of Breaux Bridge.

That's about it, gentlemen. I want to say this to the attorneys. I think you handled the case very well, and you both did the best you could under the circumstances for your clients.

Mr. Cedars, please submit a judgment in keeping with the views that I just expressed and findings of fact and conclusions of law. You have got some already written, but go over them and make sure they are supported by the evidence.

MR. CEDARS: Yes, Your Honor. I will. And I will submit it to Mr. Lucas for his approval as well.

THE COURT: Thank you, gentlemen.

COURT ADJOURNED AT 3:40 P.M.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

PAULINE MENARD	***CA NO. 89-2739**
VERSUS	***JUDGE PUTNAM**
CITY OF BREAUX BRIDGE, ET AL	***MAGISTRATE TYNES**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court hereby issues the following findings of fact and conclusions of law in conjunction with the oral reasons for judgment given at the end of the trial of this matter on August 20, 1991:

FINDINGS OF FACT

I.

Plaintiff Pauline Menard was employed by the City of Breaux Bridge as a police officer from 1981 until February, 1989. Her main duty was dispatcher.

II.

In October, 1988, plaintiff was suspended without pay for two weeks and

placed on 18 month probation. She was still on probation in February of 1989.

III.

On or about February 14, 1989, a fellow officer, Howard Devillier, discovered evidence in the police station of criminal activity by another police officer. Devillier showed this evidence to plaintiff.

IV.

Plaintiff informed her husband, Eldridge Menard, and Paulma Johnson of this evidence. Neither Mr. Menard nor Mr. Johnson were law enforcement officers. Plaintiff did not act in bad faith in discussing this information with these two persons. Even though there was no evidence of collusion between the offending officer and George Menard, the Chief of the Breaux Bridge Police Department, plaintiff did not report the suspected criminal activity to Chief

Menard or any other Breaux Bridge city policeman. Her husband, reported the existence of the evidence to Steve Champagne, an investigator with the St. Martin Parish District Attorney's office. The officer in question was later arrested by the St. Martin Parish Sheriff's Department and dismissed from the Breaux Bridge police force.

V.

George Menard, as Chief of the Breaux Bridge Police Department, had the authority to recommend the dismissal of plaintiff to the Breaux Bridge City Council. The Council, on behalf of the City of Breaux Bridge, had authority to dismiss plaintiff.

VI.

Chief Menard recommended to the City Council that plaintiff's employment be terminated since she was already on probation and she failed to follow the

chain of command in reporting suspected criminal activity, failed to notify proper legal authorities of this suspected criminal activity, and she discussed sensitive police information with persons who were not law enforcement officers. On February 28, 1989, the Council accepted Chief Menard's recommendation and plaintiff's employment as a Breaux Bridge police officer was terminated.

VII.

Other Breaux Bridge police officers who knew of the suspected criminal activity and failed to report it to Chief Menard were suspended.

VIII.

The dismissal of plaintiff was not commensurate with the misconduct set forth in Chief Menard's recommendation to the City Council but the court finds that defendants did not act in bad faith in dismissing plaintiff from her duties.

CONCLUSIONS OF LAW

I.

Violation of a public employee's First Amendment rights is determined by balancing the competing interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968).

II.

Under the facts of this case, the actions of defendants which resulted in plaintiff's dismissal do not rise to such a level to constitute a violation of any constitutional protections afforded to plaintiff under 42 U.S.C. Section 1983.

III.

As such, the dismissal of plaintiff did not violate her rights under the First Amendment to the United States Constitution. Accordingly, as a matter of law, there is no basis in federal law for the imposition of liability against any of the defendants named in this action.

IV.

Judgment shall be entered herein in favor of all defendants dismissing the complaint of Pauline Menard at her cost.

Lafayette, Louisiana, this 12th day of September, 1991.

UNITED STATES SENIOR
DISTRICT JUDGE